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JOHN T. FEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 190

EARL R. DEEN,

Petitioner,

v.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals of Texas, Eleventh Supreme Judicial District at Eastland

PETITIONER'S REPLY BRIEF

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I. QUESTIONS PRESENTED BY RESPONDENT

The questions presented by respondent have been largely anticipated by petitioner in his Brief on the Merits. On pages 3-4 of its Brief, respondent enumerates five questions, which are in reality three broad questions and may be summarized as follows:

A. the respondent is entitled to judgment on the findings of the jury;

B. if not, the Court of Civil Appeals of Texas has so decided and this decision is binding on the Supreme Court of the United States;

C. if mistaken in above contentions, then at any rate the findings of the jury that the master did not furnish the servant proper tools, that such act was negligence and was the proximate cause of the servant's injuries, are not supported by the evidence.

In respondent's long Brief are many statements petitioner does not deem accurate and petitioner does not desire that any failure on his part to answer such statements should be construed as a confession of their accuracy. Under these circumstances, the Reply Brief cannot be as brief as petitioner would prefer. Repetition of matters already presented in the Brief on the Merits will be avoided so far as practicable. Respondent's points as summarized above will be discussed in order.

II. REPLY TO RESPONDENT'S POINTS

A. *Whether Respondent Is Entitled to Judgment on the Findings of the Jury.*

1. The pleadings and the evidence supporting all the findings of the jury and the judgment of the trial court rendered thereon have been fully discussed in Petitioner's Brief on the Merits. Deen's motive in bringing the case in the state court, rather than the federal court, as discussed on page 2 of Respondent's Brief, or whether Deen could have won the case on

a general charge in the federal court (Respondent's Brief, p. 61) are matters not disclosed by the Record and are speculations that will not assist this Court in deciding the great constitutional question of whether the Texas appellate courts have deprived this injured federal employee of his right of trial by jury. Respondent says the petitioner did not review the evidence showing the extent of his injuries. (Respondent's Brief, p. 20.) That question has not been raised in this court. If it is raised petitioner will reply thereto. The trial court properly charged the jury on loss of earnings and loss of earning capacity (R. 119). The jury assessed the damages according to the instruction of the court and in accordance with their findings on other issues. The record does not show that Deen is still working for the company (Respondent's Brief, p. 21) although it does show he was working for the respondent at the time of the trial, April 12, 1954, and was still handicapped because of his injury (R. 28).

2. Throughout his Brief, respondent has continually emphasized the jury found the railroad had furnished Deen a safe method to do his work. Casually, in glancing through Respondent's Brief, petitioner has found this statement or its equivalent made, at least, seventeen times. Respondent apparently believes repetition cures inaccuracy. On page 55 of his Brief respondent emphasizes this inaccuracy by placing it in italics and

by conveying the impression that petitioner has subscribed to its accuracy in these words:

> "The jury found on what petitioner admits was ample evidence, that the railroad company furnished Deen adequate help to do the work in reasonable safety."

A proper regard for the truth would require the respondent to state that that is his construction of the jury verdict, not that the jury so found, and not that petitioner has accepted such construction of the jury verdict. A summary of the jury findings are set out on pages 5 and 6 of Petitioner's Brief on the Merits. This summary is copied by respondent on pages 23 and 24 of his Brief and is admitted to be accurate. The findings themselves are in the Record, pages 114-118. The jury did not find that with adequate help Deen could do his job safely.

3. In an effort to explain away the jury verdict, the judgment of the trial court rendered in accordance with that verdict, decisions of the Honorable Supreme Court of the United States upholding verdicts and trial court judgments in cases with similar facts such as *Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co. (1040), reh. den., 93 L. Ed. 497, 336 U. S. 53, 69 S. Ct. 413,* and *Virginian Railway Co. v. Viars, 193 F. 2d 547;* and decisions of Texas appellate courts, as *Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220.* and *Galveston, H.*

& S. A. Ry. Co. v. Brewer (1928), 4 S. W. 2d 320, respondent has deemed it advisable to initiate the court into the intricacies of the Texas practice. Repondent reveals on page 63 of its Brief that both the pleadings and the evidence must support the findings of the jury. Respondent cites six cases in support of this proposition and says it is not citing more because it doubts if petitioner can find any to the contrary. Petitioner shares that doubt and is hardly in a position to present any authorities to the contrary since in his Brief on the Merits, petitioner attempted to show both the pleadings and the evidence supported the jury findings.

> "Not only the pleadings but also the evidence support the above jury findings." (Petitioner's Brief, p. 7.)

4. Nor does petitioner have any quarrel with the general principle of law stated on page 63 of Respondent's Brief that a judgment must conform to the pleadings, the proof, and the verdict. But petitioner does not agree that this means that a part of the pleadings or a part of the proof or a part of the verdict may be looked to in determining the correctness of a trial court's judgment and other parts disregarded. It is the duty of an appellate court to consider the pleadings, evidence and verdict in their entirety in determining their sufficiency to support a trial court's judgment. It is the duty of an appellate court to indulge every presumption in favor of the

correctness of the trial court's judgment, to construe the pleadings and the evidence liberally to uphold such judgment, and to give effect, if possible, to all findings of the jury on which such judgment rests.

5. Throughout its Brief in arguing that the jury found that the railroad furnished Deen a safe method to do his work, which the jury did not find, respondent ignores these fundamental principles, recognized not only in Texas but in all common law states and countries.

6. The argument that the railroad furnished Deen a safe method of doing his work, as presented by respondent, is based in part on the pleadings of the petitioner. This argument is that plaintiff's (petitioner's) pleading was that the railroad was negligent either in failing to furnish proper tools or in failing to furnish adequate help and since these acts of negligence were plead in the alternative the burden was on the plaintiff to prove both acts of negligence in order to recover. (Respondent's Brief, p. 43.) Such was the Court of Civil Appeals of Texas construction of petitioner's pleading. "Deen alleged it was defendant's duty to either furnish tools or sufficient help." (R. 190.) But such construction is based on a part only of the pleading. Such construction does not liberally construe the pleadings so as to uphold the verdict of the jury and the judgment of the trial court ren-

dered thereon. Such construction ignores another part of Petitioner's pleading:

> "That the injuries herein set forth resulting to the Plaintiff were the direct and proximate result, jointly and severally, of the negligent acts of the Defendant in the following respects:
>
> "A. That the Defendant was negligent in not notifying Plaintiff's foreman that the new melting pot was being sent to the roundhouse for installation, in order that said foreman would have had proper tools as herein described for the removing of said babbitt, or in the alternative having sufficient help, as herein mentioned, to remove said babbitt without the use of tools.
>
> "B. That the Defendant was negligent in not having the foreman present and proper supervision.
>
> "C. That the Defendant was negligent in not furnishing Plaintiff with proper tools, as herein described, to remove said babitt.
>
> "(fol. 7) D. That Defendant was negligent in not furnishing at least two additional men to assist Plaintiff in removing the babbitt from said pot." (R. 4.)

Isn't it significant that respondent on page 22 of its Brief, in presenting plaintiff's pleading on this point copies down to where plaintiff alleges that his injuries were the direct and proximate result, jointly and severally of the negligent acts of the defendant, replaces this all important allegation with three little asterisks, and then resumes his verbatim quotation? Petitioner can hardly censure respondent too harshly for this practice since the court of Civil Appeals of

Texas ignored this part of petitioner's pleading. Now isn't it true that plaintiff alleged that the carrier was under the duty to furnish proper tools to remove the babbitt or, in the alternative, to provide sufficient help, but that plaintiff also alleged that these two acts of negligence with other acts of negligence, jointly and severally, were the proximate causes of plaintiff's injuries? That is what the Supreme Court of Texas said petitioner pled in commenting on the Deen case in *Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220, 225:*

> "Petitioner alleged that the carrier was under the duty to furnish proper tools to remove the babbitt, or in the alternative to provide sufficient help to remove the babbitt without the use of tools, and that the railroad was negligent in failing to furnish proper tools and in failing to provide sufficient help."

No special exception was urged to plaintiff's pleading in the trial court on the ground it was ambiguous or inconsistent in pleading additional help and proper tools both in the alternative and as concurrent acts of negligence. It is true that respondent excepted to the allegation of proper tools because the allegation did not specify what tools (R. 7).

As pointed out in Petitioner's Brief on page 17, the case was submitted to the jury on a charge where the failure to furnish tools and the failure to furnish adequate help were each considered as concurrent

acts of negligence, each being a proximate cause of the injuries. The trial court rendered judgment on that theory.

7. As in construing and giving effect to the verdict of the jury, the respondent wishes this Court to consider only a part of plaintiff's pleading, so the respondent wishes the Court to consider only a part of the evidence. But here again the Court must consider all the evidence and construe it liberally in favor of the verdict of the jury and the judgment of the trial court rendered thereon. On page 7 of Respondent's Brief it says that petitioner has made no reference to evidence detailed in the opinion of the Court of Civil Appeals. To this petitioner pleads guilty. The petitioner does not accept the Court of Civil Appeals of Texas as a fact finding agency. For the facts, petitioner refers to the findings of the jury, and such implied findings made by the trial court in rendering judgment and in giving effect to all the findings of the jury. It is of no importance whether the Court of Civil Appeals of Texas has properly weighed conflicting evidence. It is important whether the evidence supports the findings of the jury and the implied findings of the trial court.

The undisputed evidence does not show that with adequate help, Deen could have performed his work safely. The evidence developed in the trial court by the respondent in its cross-examination of witnesses

Deen and Snow (Petitioner's Brief, p. 25) and the construction placed on the evidence by the respondent in the trial court (Petitioner's Brief, p. 24) certainly show that there was a conflict in the evidence as to whether with adequate help Deen could do the work safely. On page 12 of Respondent's Brief it charges petitioner with quoting Deen's testimony, that the accident would have happened if the whole shop had been there, out of context. In an effort to show what Deen really meant when he said that if the whole shop had been there handling the pot, it might have fallen on two of them (R. 63), respondent quotes at great length from the record (R. 62-63) on pages 12, 13, 14, 15 and 16 of its Brief. But as in the case of the pleading, respondent omitted from its quotation that part that was damaging to its construction of the pleading, so it omits from its quotation of the evidence that part that is damaging to its construction of the evidence. Pleadings in support of the jury's findings are concealed behind asterisks in Respondent's Brief. Evidence tending to show the manually handling of the pot, even with additional help, would be dangerous and was not a safe method, is concealed in Respondent's Brief behind these words:

> "Immediately following the last above quoted part, he (Deen) went on to point out that the fourth man would have been more in the way than a help. We pick up with his testimony again on page 64." (Respondent's Brief, p. 15.)

When petitioner turns to the Record, he finds concealed behind the above words in Respondent's Brief, the following additional evidence by Deen:

> "Cross-examination by respondent: And after you had gotten it up you think a third man or a fourth man could not have had anything to do with it falling out" and you answered: "No, sir." Then Question 178: "In your opinion it would fall out if six men were there?" Answer: "Just as apt to." Question 179: "And you don't know but what your leg would have been in exactly the same shape if there had been six men helping?" and you answered: "That's right." Now, was that your testimony in your deposition? A. "Yes, sir." Q. "Is it true?" A. "Yes, sir." (R. 64.)

Respondent does not charge the evidence quoted from the cross-examination of the witness, Snow, to the same effect is out of context (Petitioner's Brief, p. 24). Respondent has given no satisfactory explanation why it told the trial court "it is undisputed that as far as this accident itself is concerned, additional employees could not and would not have prevented this happening" (R. 121), and that there was no proximate cause issue for the jury on the railway failure to furnish additional help "for reason that under the undisputed evidence the failure to furnish one or more additional men was not and could not be a proximate cause of plaintiff's injuries" (R. 130), and why in this Court it contends that the jury findings that the defendant did not fail to furnish one or more additional men to plaintiff, other than Snow, to assist plaintiff in removing the babbitt from the

melting pot, that Deen was negligent in failing to obtain additional help, and such negligence was a proximate cause of his injuries, are the equivalent of being a finding by the jury that the railway company furnished adequate help to Deen to do the work involved with reasonable safety (Respondent's Brief, p. 38).

8. Respondent says on pages 16 and 54 of its Brief that petitioner has misconstrued the evidence developed by respondent on the cross-examination of Deen and Snow to the effect that the accident would have happened if additional help had been present and respondent's contention in the trial court that additional employees would not and could not have prevented this happening. Respondent says that all that it meant by this evidence and by these contentions were that if Deen was going to put his leg in the place where he knew the babbitt was going to fall, he was going to get his leg broken, whether the work was done by six men, by a lifting device or any other way (Respondent's Brief, p. 54). But even if this is true, we are concerned with the construction of the evidence which is for the jury and the construction of judicial admissions which should be construed in favor of the judgment of the trial court. Surely respondent will not contend that a jury verdict and the judgment of the trial court should be set aside on what respondent meant to say by his evidence and admissions rather than on what it did say. If this Court construes respondent's evi-

dence and admissions by what it says it meant rather than what it said, the conclusion is inescapable that in the trial court respondent's position was that Deen's injuries were due to his putting his leg in the way of the falling babbitt and in this Court respondent's position is that Deen's injuries were solely due to his failure to obtain additional help.

On conflicting evidence, which petitioner has not detailed because the findings of the jury in this connection have not been attacked, the jury found among other things:

(1) that Deen was not negligent in the manner and method he used in doing the work;

(2) that the sole proximate cause of Deen's injuries was not due to his own acts and conduct.

9. The petitioner did not plead that with additional help Deen could do his work safely. The undisputed evidence does not establish that the manual handling of the steel pot was a safe method, and the jury did not find that the railway provided Deen a safe method to do his job. The jury could have reasoned that if Deen had obtained additional help he would not have been injured but that the method of manually handling the heavy steel pot might nevertheless be dangerous to one of the workmen if they lost control of it and it unexpectedly fell backwards or forwards. Such was the reasoning of the Supreme Court of Texas on a similar point in a case where the facts are almost

identical with the Deen case [*Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 224*]:

> "The jury could have reasoned that if the plaintiff had obtained the help of another workman, he would not have been injured from the effort of tilting the drum, but that the method was nevertheless unsafe because either or both of the workmen might be injured if they lost control of the drum."

In considering the possibility of danger from the manual handling of the steel pot, with contents, the jury had before it a full description of the steel pot. It was about a yard long, ⅔rds of a yard wide, ⅓rd of a yard deep (R. 17), and with its contents weighed almost a half a ton (R. 18) and had a rim only 1½ to 2 inches wide, where it could be gripped (R. 19). It is not true that the undisputed evidence shows that the small, heavy, steel pot could be safely handled manually or that the company's furnishing of additional help, as found by the jury, provided a safe method of doing the work. The fact that the steel pot had been turned over manually before without mishap is not conclusive on the question whether this was a safe method of doing the work. In *Port Terminal Railroad Association v. Ross, 289 S. W. 2d 220, 222*, the Supreme Court of Texas upheld a jury verdict in favor of the injured employee even though the evidence showed the method of doing the job had been followed for about two months without mishap:

> "Throughout the period of some two months after the spigot was broken, plaintiff and Graham

were together whenever oil was poured from the drum. On each of these occasions, they tilted the drum together and poured the oil therefrom without mishap."

9. It is not true that the company furnished Deen only one method to do his job and the jury so found. Defendant pled it did not furnish any method at all for doing the work but left the selection of the method to Deen (R. 7). Defendant pled the selection of the method was solely by Deen and that there was no instruction or requirement by the company (R. 8). Defendant pled: "if there was any negligence in the method used, the equipment used, or the amount of help used, or the way and the manner in which the work was done, the Plaintiff himself was the man that chose all of same of his own volition, without any instruction or requirement from the Defendant, and if there be any negligence involved in any of the matters set out in this paragraph it was the (fol. 11) Plaintiff's negligence and proximately contributed to his injuries" (R. 8). That is a plea of contributory negligence. The jury found Deen guilty of contributory negligence. Respondent wants this Court to construe the jury's findings of contributory negligence as the sole act of negligence causing Deen's injuries. The jury found, among other things, that the railway company should have reasonably anticipated that the plaintiff would perform the work which caused his injuries in the way and manner in which he did (R. 118). The case was submitted to the jury both on

issues of the failure to furnish additional help and the failure to furnish proper tools. Construing the pleadings and the evidence in favor of the verdict of the jury and the judgment of the trial court, one must conclude additional help and proper tools were both necessary to make the method of work reasonably safe. While under the jury findings the railway did furnish additional help, under the same findings the railway did not furnish proper tools (R. 115). The job was not simply the removal of the babbitt from the pot. The job was the removal of the pot from the furnace, the transfer of the babbitt from the old pot to the new pot, and the placing of the new pot on the furnace. Under the findings of the jury, a combination of additional help and proper tools were necessary to do this job in safety. Such findings are in accord with the facts. On page 8 of Petitioner's Brief the customary method of handing the pot and emptying out the babbitt are described in these words:

> "The customary method of handling the extraction of solidified babbitt from the steel pot had been to lift the pot and babbitt off the furnace with the crane, as Deen did, place it on the floor, release the arms of the crane, get five or six men to come and turn the pot over manually, empty out the contracted babbitt, and then again attach the arms of the crane and hoist the pot back on the furnace."

On page 7 of Respondent's Brief it quotes the above as a correct statement of the facts in this particular. The customary method of handling the steel pot and

babbitt, as conceded by both parties, certainly does not show that the job was solely a man-handling one as respondent contends throughout its brief. Other facts in the record certainly indicate, and the jury could have so concluded, that it was impossible for manual labor alone to handle this job. Respondent in its Brief on page 6 quoting from Petitioner's Brief as a correct statement of the facts says:

> "The 250-pound steel pot, about a yard long, ⅔ of a yard wide, and ⅓ of a yard deep (R. 17) containing 650 to 700 pounds of babbitt, a total weight of almost half a ton, fitted so snugly in the furnace that it was necessary to pry its 1½ to 2 inch rim (R. 19) off the brick furnace a height of about an inch (R. 14) so as to allow the arms of the crane to grip it and lift it from the furnace (R. 14-15)."

Clearly it would be unrealistic to say this part of the job was a man-handling one. How could the men grip a steel pot with its contents weighing almost a half a ton that fitted so snugly into a brick furnace, when the pot's steel rim was only 1½ to 2 inches wide? Surely this part of the job was for a machine. The railway company furnished a machine to do it, a crane. Again quoting from Respondent's Brief, page 6:

> "A crane on a pole affixed to the concrete floor with a hoist was right beside the furnace for lifting heavy objects."

Of course, Deen used the crane to lift the pot from the furnace (Respondent's Brief, p. 6). That is the

reason the railway company put it there. That is the reason the jury said that the railway company should have reasonably anticipated that Deen would perform the work in the way and manner which he did (R. 118). The Record does show, contrary to respondent's contention (Respondent's Brief, p. 7), that there was urgency in Deen's getting his job done. (R. 59.) While the crane was provided by the railway company for handling the steel pot, its hooks had difficulty in gripping the 1½ to 2-inch rim. It slipped from the hooks and crashed to the concrete floor (Respondent's Brief, p. 6). Fortunately no one was hurt at that time. If a crane used to lift a half-ton object was so equipped that the object might unexpectedly drop at any time, couldn't it be reasonably anticipated that some one might be hurt by such occurrence? Is a crane that will not securely hold a heavy object in the air and will not overturn it to empty out its heavier contents when the object reaches the ground a proper tool for the job? The jury said it was not a proper tool (R. 115).

Petitioner says that the steel pot should have been so equipped that the crane, provided by the railway company to lift it on and off the furnace, could hold it securely while in the air and over-turn it when it reached the floor. This, of course, does not mean the jury's findings that Deen was negligent in not using available help and this was a proximate cause of his injuries should be disregarded. It simply means that

Deen's negligence in failing to obtain help was a proximate cause of his injuries and the railway's negligence in failing to provide proper tools was also a proximate cause. There may be more than one proximate cause:

30 B Tex. Jur., Sec. 44, p. 223:

> "On the contrary, there may be more than one proximate cause of injuries inflicted or damages done."

As this record is developed, it is not true that with proper tools, Deen would not need additional help, nor even with additional help he would not need proper tools. The jury could have concluded that manual labor alone could not have lifted a snugly fitting steel pot with contents weighing almost one-half a ton with a 1½ to 2-inch rim off a brick furnace, over-turn it, empty out its contents, and replace it snugly on the furnace, particularly when the railroad company had placed beside it a hoist for lifting heavy objects. On the other hand, the jury may have concluded that even with proper tools Deen would need additional help in transferring the 650 to 700-pound babbitt from the old pot to the new one once it had been emptied out on the floor. The jury may have concluded the handling of 650 to 700 pounds of babbitt by manual labor is a reasonably safe way to do it, whereas the manually handling of a steel pot, with its contents, weighing almost a half ton is not safe where the pot is only a yard long, the babbitt inside is not controlled and is apt to slough out suddenly and unexpectedly. The cus-

tomary and the correct method of doing the job which Deen had to do, was not manually but a combination of manual labor and proper tools. Both were necessary to make the method safe. That is what the jury said. That was the theory upon which the trial court rendered judgment.

B. *Whether the Supreme Court of the United States is bound by the Decision of the Court of Civil Appeals of Texas.*

1. Respondent next contends the construction by the Texas Court of Texas pleadings, Texas jury findings, in the light of the record, is binding upon the United States Supreme Court. But Deen is a federal employee, claiming federal rights under an Act of Congress. State courts under the guise of applying local procedural rules, cannot deprive a federal employee of substantive federal rights given him by the Congress under the Federal Employers Liability Act. This is the rule, as we understand it, as stated by the Supreme Court of the United States in *Garrett v. Moore-McCormack Company, 317 U. S. 239, 63 Supreme Court Reporter 246, 87 L. Ed. 239 (1942)*. In this decision, the Court stated that the Jones Act, which was there involved, is to have uniform application throughout the country, unaffected by local views of common law rules. In that decision, the Court also says that the Federal Employers Liability Act is also to be uniformly ap-

plied throughout the country. In the course of the opinion, Mr. Justice Black stated:

> "If by its practice the State Court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny, federal rights which Congress, by providing alternate remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not long ago we sought to achieve this result with respect to enforcement in the federal Courts of rights created or governed by State law."

Where a federal employee has been deprived by the State Courts of a jury trial, given him by the Congress under the Federal Employers Liability Act, the United States Supreme Court has not hesitated to interfere, *Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver & Rio Grande Western R. Co. (1949), reh. den., 93 L. Ed. 497, 336 U. S. 53, 69 S. Ct. 413; Ellis v. Union Pacific R. Co. (1947), 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572.* In the Ellis case, the United States Supreme Court says:

> "And that negligence must be 'in whole or in part' the cause of the injury. 45 U. S. C. Sec. 51, 45 U. S. C. A. Sec. 51; Brady v. Southern Railway Co., 320 U. S. 476, 484, 64 S. Ct. 232, 236, 88 L.

> Ed. 239. Whether those standards are satisfied is a federal question, the rights created being federal rights."

Irrespective of what the Supreme Court of Texas may have said in *Hopson v. Gulf Oil Corporation, 150 Tex. 1, 237 S. W. 2d 352*, or in *Socony Vacuum Oil Co. v. Aderhold, 150 Tex. 292, 240 S. W. 2d 751*, as quoted on pages 52 and 53 of Respondent's Brief, to the effect that cases tried in Texas Courts under the Jones Act or the Federal Employers Liability Act are governed by rules of Texas practice, by the time the Supreme Court of Texas had decided *Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220*, the Supreme Court of Texas had learned the correct rule and states it in almost identical language to that used by the United States Supreme Court in *Wilkerson v. Wilson McCarthy and Henry Swan*, supra. The Supreme Court of Texas now states the rule as shown in the *Ross* case, in these words:

> "(7) In an action under the Federal Employers Liability Act, the question of what constitutes negligence and the sufficiency of the evidence to raise that question for the jury is to be determined by the applicable federal decision."

C. *Whether Evidence is Sufficient to Support Jury Finding on Railroad's Failure to Furnish Proper Tools.*

The petitioner comes to respondent's final point that the evidence is not sufficient to support the jury finding that the railroad failed to furnish Deen proper tools. Evidence which petitioner believes fully sustains the jury findings

on the failure to furnish proper tools and that this was a proximate cause of Deen's injuries is set out on pages 9-10 and the argument based thereon appears on pages 20-23 of Petitioner's Brief. Deen and Snow said bolts or clamps should be attached to the pot so that it could be over-turned by the available crane. Both Deen and Snow were experts in these matters. The attorney for the railroad in cross-examining Deen developed his expertness:

> "Q. Now, getting back to getting that pot out, I think you had taken it out about three times before in the past two or three weeks, had you not?
>
> "A. Something like that.
>
> "Q. You knew how to handle that job, didn't you, Earl?
>
> "A. I thought I did.
>
> "Q. Was there anyone out there that knew more about it than you did, or who had taken out more times than you had?
>
> "A. No, sir.
>
> "Q. You were an experienced man, weren't you?
>
> "A. I thought I was." (R. 57.)

Snow was acting blacksmith and testified that if the steel pot had I-bolts fitted into it that it could safely be handled with the crane (R. 90). That he could have done this work in his shop (R. 90). That he had the torch and drill to cut the holes in the steel pot and that he could make the I-bolts (R. 92). But respondent says this method would be dangerous (Respondent's Brief, p. 72). If the railroad had any information as to the danger of such a method it

did not present it to the jury. As pointed out in Petitioner's Brief on the Merits, such silence is a circumstance to be considered against it. Petitioner cited *Texas and Pacific Ry. Co. v. Riley (1944) (Court of Civil Appeals of Texas, 183 S. W. 2d 991, writ of error refused by the Supreme Court of Texas. certiorari denied, 325 U. S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991)*, in support of this proposition. Respondent, on page 72 of its Brief, says the above rule does not apply where defendant puts on no testimony at all.

> "Under such circumstances, no presumption exists, and appellee's authorities are inapplicable." (Respondent's Brief, p. 73.)

But in the *Riley* case, which decision was approved by the Supreme Court of Texas, cited in support of the rule that a party's silence has a certain probative force, the Court said at page 992:

> "At the conclusion of appellee's testimony appellant moved for an instructed verdict which was by the Court denied. Appellant offered no testimony."

Snow certainly did not testify the fastening of bolts to the pot so that it could be gripped by the hooks of the crane would be dangerous (R. 90). Certain parts of Deen's testimony are subject to the construction that he testified that the use of clamps on the steel pot would be dangerous. Because of Deen's innate honesty and lack of intelligence, he made some general admissions that a more wily and dishonest person would not have been led into. Of course, petitioner by that expression is not saying that if Deen had been willing to lie a stronger case could have been made as respondent attributes to petitioner on page 17 of

Respondent's Brief. What petitioner is saying is that Deen, by lack of intelligence and alertness, answered some vague, double barrelled questions, which he did not really understand, by some apparent general admissions, which he really did not intend to make, and which were not in accordance with the facts as reflected by the record as a whole. For example, consider the following evidence in response to questions by respondent's attorney:

> "Q. Question 191: 'You know of no device that would hold it?' (Pot) Answer: 'We had thingd to lift so it could not turn or roll, that is, so long as your hoist stuck so that you can get it turned over and get the babbitt out, but you are likely (fol. 112) to throw a piece of cast iron through it; it is dangerous' did you answer that?
>
> "A. Yes, sir.
>
> "Q. Is that true?
>
> "A. Yes, sir.
>
> "Q. Now, let's get back to the matter of clamps."

This testimony is quoted on page 69 of Respondent's Brief, except it omits the remark of respondent's attorney: "Q. Now, let's get back to the matter of clamps." What was Deen talking about when he said: "We had things to lift it so it could not turn or roll so long as your hoist stuck so that you can turn it over and get the babbitt out but you are likely to throw a piece of cast iron through it; it is dangerous?" When the attorney for respondent says immediately thereafter "now let's get back to the matter of clamps," doesn't that indicate Deen is not talking about clamps being dangerous? Now this evidence, in connection

with other evidence, which appears to be a general admission by Deen that clamps would be dangerous, is used as the basis for respondent's argument, page 72 of its Brief:

> "Of course, as he points out, the pot is cast iron, and when you clamp onto cast iron and lift, the probabilities are that the cast iron will fracture and the piece pull out or be thrown out."

Even if Deen did make a general admission that the clamps he proposed would be dangerous, such an admission would not be conclusive on the evidence. This point arose in *Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 223.* The Supreme Court of Texas in that case said:

> "Plaintiff testified that there would have been no accident if Washington or Graham had helped him, but this is an expression of opinion which cannot be given conclusive effect as a judicial admission."

In stating in its Brief that Deen admitted the use of clamps would be dangerous, respondent seizes upon certain general statements by Deen to this effect and completely ignores other parts of Deen's testimony and the testimony of other witnesses. For example, in addition to the testimony of Deen cited by respondent, tending to show the use of clamps were dangerous, respondent makes no reference to the following testimony of Deen:

> "Q. With reference to that equipment being dangerous; what equipment did you have reference to?
>
> "A. The deal—any deal would be dangerous without it was securely fastened and put on in such a way that it would be absolutely secure." (R. 83.)

In connection with the evidence of Deen and Snow that the pot should have been so equipped that the crane that lifted

it on and off the furnace could over-turn it and empty out its contents, petitioner again calls the Court's attention to *Galveston, H. & S. A. Ry. Co. v. Brewer (1928) (Court of Civil Appeals of Texas, writ of error refused), 4 S. W. 2d 320.* This decision was approved by the Supreme Court of Texas. The evidence both developed on direct examination and cross-examination set out in considerable detail is very similar to the testimony of Deen and Snow. The case involved a hoist and the plaintiff and his fellow workers suggested a simple device that would prevent stringers (timbers) from slipping and falling when being loaded on a flat car. Brewer was injured by being struck by a falling timber. Just as in the *Deen* case the railroad urged Deen should not have put his leg in the way of the falling babbitt, so in the *Brewer* case the railroad urged Brewer should not have placed himself in the way of the falling timber. Brewer and fellow employees testified as did Deen and Snow that the simple devices they recommended for making the method of doing their jobs safe, so far as they knew, were not in use and they had never seen them in use. The evidence in the *Brewer* case is much stronger in favor of the railroad than in the *Deen* case because the railroad offered evidence in the *Brewer* case that the hoisting machine and the apparatus connected therewith was scientifically constructed and the kind in general use for the purpose of hoisting heavy timbers and other materials. In the *Deen* case, the railroad said nothing. In the *Brewer* case the Court of Civil Appeals said, and the Supreme Court of Texas approved, that the jury was justified in

finding on such evidence that the railroad did not furnish Brewer proper appliances and this was the proximate cause of his injuries.

III. CONCLUSION

As respondent charges petitioner relies very heavily on

Clyde Wilkerson v. Wilson McCarthy and Henry Swan, as Trustees of Denver and Rio Grande Western R. Co. (1949), reh. den., 93 L. Ed. 497, 336 U. S. 53, 69 S. Ct. 413;

Virginian Railway Co. v. Viars, 193 F. 2d 547;

Port Terminal Railroad Association v. Oliver Ross (1956), 289 S. W. 2d 220; and

Galveston, H. & S. A. Ry. Co. v. Brewer (1928), 4 S. W. 2d 320.

The first is a decision by the United States Supreme Court. The second is a decision by the United States Court of Appeals, Fourth Circuit. The third is a decision by the Supreme Court of Texas. The fourth is a decision by the Court of Civil Appeals of Texas, approved by the Supreme Court of Texas. These four decisions are in complete harmony in holding that in master and servant cases, the jury decides conflicts in the evidence, draws inferences therefrom, passes on the credibility of witnesses, weighs the conflicting versions as to the cause of the accident and that an appellate court is not permitted to substitute its findings of fact for that of the jury. Respondent attempts to distinguish the *Wilkerson, Viars,* and *Brewer* cases, supra, from the *Deen* case on the ground that in the *Deen* case

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the jury found the master furnished Deen a reasonably safe way to do his work. This is not sound because the jury's findings construed as a whole means that proper tools and additional help were both necessary for Deen to do his job safely and while the railway provided Deen adequate help, it did not provide proper tools, and therefore Deen was not provided a safe method to do his job. Respondent makes no effort at all to distinguish the *Port Terminal Railroad Association* case, supra.

Petitioner prays that the judgment of the Court of Civil Appeals be reversed and the judgment of the trial court be affirmed as specifically heretofore set out in his Brief on the Merits.

Respectfully submitted,

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March 20th, 1957

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Reply Brief has been mailed, on the 20th day of March, 1957, to the respondent's attorneys, as follows: to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas.

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